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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Revision of Part 22)
of the Commission's Rules)
Governing the)
Public Mobile Services)

CC Docket No. 92-115

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION AND/OR CLARIFICATION

Triad Cellular Corporation ("Triad"), by its attorneys and pursuant to Section 1.106 of the Commission's rules, hereby seeks partial reconsideration and/or clarification of the Report and Order in CC Docket No. 92-115, Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, FCC 94-201, released September 9, 1994 ("Part 22 Revision Order"). In support hereof, the following is respectfully shown:

I. The Commission Has Adopted Conflicting Versions of Rule Section 22.949

1. The Commission has adopted, in two separate rulemaking proceedings, conflicting versions of the same rule section (section 22.949) governing the processing of mutually exclusive cellular Phase I unserved area applications. In the Part 22 Revision Order the Commission adopted, inter alia, rule section 22.949, entitled "Unserved

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area licensing process," which states that mutually exclusive cellular Phase I unserved area applications will be subject to lottery procedures.^{1/} In the Third Report and Order in Docket No. 93-252, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, FCC 94-212, released September 23, 1994 ("Regulatory Treatment Third Order"), the Commission also adopted, inter alia, a rule section 22.949 entitled "Unserved area licensing process," which states that competitive bidding (auction) procedures will apply.^{2/} The

^{1/} The rule states, in relevant part:

... whenever two or more acceptable Phase I initial applications are timely-filed in the same market on the same channel block, such Phase I initial applications are mutually exclusive, regardless of any other considerations such as the technical proposals. In order to determine which of such mutually exclusive Phase I initial applications to grant, the Commission administers random selection procedures in accordance with Part I of this chapter.

47 C.F.R § 22.949(a)(2). Part 22 Revision Order, Appendix B, at B-85.

^{2/} The rule states, in relevant part:

... whenever two or more acceptable Phase I initial applications are timely filed in the same market on the same channel block, such Phase I initial applications are mutually exclusive, regardless of any other considerations such as the technical proposals. In order to determine which of such mutually exclusive Phase I initial applications to grant, the Commission administers competitive bidding procedures in accordance with Subpart Q of Part 1 of this chapter.

47 C.F.R. § 22.949(a)(2). Regulatory Treatment Third Order, Appendix B, at p. 20.

version of the rule set forth in the Regulatory Treatment Third Order also contains a note stating that applications filed between March 10, 1993 and July 25, 1993, will be subject to lottery.^{3/}

2. Triad requests that the Commission clarify that it will, in fact, use auctions and not lotteries for mutually exclusive Phase I unserved area applications filed after July 25, 1993. Neither the text of the Part 22 Revision Order nor Appendix A thereto, entitled "Detailed Discussion of Part 22 Rules Amendments," discusses rule section 22.949 or unserved area application processing generally.^{4/} Based on the provisions of the Communications Act authorizing auctions, the rulemaking proceedings in both the Part 22 Revision and the Regulatory Treatment dockets, and other relevant proceedings, however, there can be no doubt that auctions are to be used.

3. Section 309(j)(1) of the Communications Act, enacted into law in August 1993, grants the Commission authority to use competitive bidding to award licenses when mutually exclusive applications for initial licenses or construction permits have been accepted for filing.

^{3/} Id. In a Memorandum Opinion and Order, FCC 94-123, released July 14, 1994, the Commission decided to lottery mutually exclusive unserved area applications filed before July 26, 1993. The Order did not address applications filed after that date.

^{4/} See Part 22 Revision Order at paras. 5-19 & Appendix A, p. A-44.

47 U.S.C. § 309(j)(1). In its proceeding to establish rules implementing this authority, the Commission stated that "mutual exclusivity in common carrier services generally, and in the Public Mobile Services specifically, will be resolved through the use of competitive bidding."^{5/} Furthermore, the Competitive Bidding Second Order states that mutually exclusive applications in the Public Mobile Services will be subject to auctions "unless specifically excluded."^{6/} Rule sections 1.2102(b) and (c), which contain the specific exclusions, do not cite unserved area applications.^{7/} Similarly, the Regulatory Treatment Third Order provides that the Commission will use auctions for all mutually exclusive initial Commercial Mobile Radio Service ("CMRS") applications, including cellular unserved area applications.^{8/} Thus, the Commission's clear intent is to hold auctions to resolve mutually exclusive cellular Phase I unserved area applications.

^{5/} Implementation of Section 309(j) of the Communications Act, Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd. 2348, 2352 para. 17 (1994) ("Competitive Bidding Second Order").

^{6/} Id. at 2359 para. 61; see also id. at 2405-06 (rule section 1.2102(a)(5)).

^{7/} Id. at 2406. See also Second Memorandum Opinion and Order in PP Docket No. 93-253, 75 RR 2d 1178 at paras. 7-8, where, on reconsideration of the Competitive Bidding Second Order, the Commission plainly expresses its intent that auctions will be used for mutually exclusive unserved area applications filed after July 26, 1994.

^{8/} Regulatory Treatment Third Order at para. 332.

4. The version of Section 22.949(a)(2) contained in the Part 22 Revision Order appears to be a remnant of the originally proposed revisions to Part 22 of the Commission's rules. The Notice of Proposed Rule Making in CC Docket No. 92-115, which proposed lottery procedures, was released June 12, 1992, more than one year before the Commission was granted auction authority.^{9/} In light of subsequent developments and the Commission's recognition that in the Public Mobile Services "auctions ... provide the most efficient way to determine which of several mutually exclusive applicants should prevail,"^{10/} it would be anachronistic for the Commission's rules to authorize lotteries of mutually exclusive Phase I unserved area applications.

5. In sum, the Commission should clarify that the version of rule section 22.949(a)(2) adopted in the Part 22 Revision Order is erroneous and that the version of that rule adopted in the Regulatory Treatment Third Order controls the processing of mutually exclusive unserved area applications.^{11/}

^{9/} See 7 FCC Rcd. 3658 (1992).

^{10/} Part 22 Revision Order at para. 12.

^{11/} The Commission also should clarify whether the version of rule section 22.131 adopted in the Part 22 Revision Order or the version of the same rule adopted in the Regulatory Treatment Third Order controls. Both versions of that rule, entitled "Procedures for mutually exclusive applications," state that "[t]wo or
(continued...)"

WHEREFORE, the premises duly considered, Triad requests that on reconsideration of the Part 22 Revision Order the Commission revise its rules governing the Public Mobile Services consistent with the foregoing.

Respectfully submitted,

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^{11/}(...continued)

more pending applications are mutually exclusive if the grant of one application would effectively preclude the grant of one or more of the others under Commission rules governing the Public Mobile Services involved." The version adopted in the Regulatory Treatment Third Order is significantly more detailed than the version in the Part 22 Revision Order, however.

CERTIFICATE OF SERVICE

I, Sondra Renee Rich, hereby certify that I have on this 19th day of December, 1994, caused a copy of the foregoing "Petition for Partial Reconsideration and/or Clarification" to be delivered by hand to the following:

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